

**A Sangka bin Chuka & Anor v Pentadbir Tanah Daerah Mersing,
Johor & Ors**

B HIGH COURT (JOHOR BAHRU) — APPLICATION FOR JUDICIAL
REVIEW NO 25–27–02 OF 2012
MOHD NAZLAN JC
11 JANUARY 2016

C *Land Law — Customary land — Right to — Whether Jakun community of
orang asli established rights to customary lands — Whether land administrator's
notice under s 425 of National Land Code to members of Jakun community to
forthwith vacate their customary lands invalid — Whether common law
customary land rights of Jakun community unimpaired and not extinguished by*
D *NLC or any other legislation — Whether respondents breached fiduciary duty to
ensure welfare and customary land rights of Jakun community were protected*

E The first respondent had issued a notice ('the notice') affixed to a tree in Pantai
Burung, located within the 25,295 hectare Johor Endau-Rompin National
Park, that required trespassers to demolish any structures they had built or
vegetation they had cultivated and to vacate the area within 24 hours. The
notice said if they failed to do as directed, penal sanctions would be taken
against them under s 425 of the National Land Code ('the NLC'). Although
F the notice was addressed 'to whom it may concern', the applicants contended
that it was directed at the Jakun community of the *orang asli* in Kampung Peta.
This was because four months before the notice was issued at the third
respondent's urging, the latter had written to the second applicant requesting
that the Jakun of Kampung Peta refrain from clearing, cultivating and carrying
out other activities in and around Pantai Burung and to vacate the area. In
G response to that letter, the applicants' solicitors wrote to the third respondent
asserting that the applicants were merely carrying out activities on their native
customary lands and sought a clarification on his letter to the second applicant,
which never came. In their instant application for judicial review to, inter alia,
quash the notice, the applicants sought declarations that the Jakun of
H Kampung Peta held native customary land rights over certain lands in and
around the Endau-Rompin National Park ('the national park') and Kampung
Peta; that the respondents had no authority to extinguish those rights without
payment of adequate compensation and that, in any event, the respondents
owed a fiduciary duty under the law to protect the customary land rights of the
I Orang Asli Jakun Kampung Peta. Apart from seeking compensation and
damages as well as injunctions to prevent the respondents from encroaching
into their customary lands, the applicants sought an order of mandamus to
compel the respondents to *de-gazette* any part of customary lands that had
come under the national park forest reserve and to return the use of those lands

to the applicants and the Jakun of Kampung Peta. Relying upon a map they had tendered in evidence, the applicants contended that the Jakun of Kampung Peta had from time immemorial continuously occupied an area of 15,000 acres demarcated on the map for their customary activities such as cultivation and residence, hunting, fishing, collecting of forest produce and erecting of ceremonial sites for worship and burial. The applicants said that when the fifth respondent in 1989 *gazetted* the huge forest reserve that became the national park, it encroached into, and was created over, part of the customary lands and subsequently chalets, buildings and offices were erected on parts of those lands without payment of any compensation to the Jakun of Kampung Peta. As they had acquired native customary land rights at common law, and had occupied the customary lands with the knowledge, acquiescence and even 'consent' of the relevant respondents, the applicants contended that their rights could not be impaired or extinguished by the NLC.

Held, allowing the application in part with costs of RM5,000:

- (1) The applicants had, on balance of probabilities, succeeded in establishing their case for judicial review of the decision relating to the impugned s 425 of the NLC notice issued by the first respondent. On the evidence, they had satisfactorily proven the threshold issue of prior and continuous use and occupation which was the pre-requisite to establishing customary land rights. The applicants had shown not only that the activities of hunting, fishing and foraging were integral elements to the custom and traditional activities of the Jakun of Kampung Peta but that such practices were so very closely intertwined with their use of and reliance on the lands which they claimed to be ancestral and customary in nature and which had long been the primary source and essence of their very existence and would continue to be essential to their future livelihood (see paras 61, 64 & 100).
- (2) Given the compelling, almost overwhelming, and in large parts uncontroverted affidavit evidence, there was no justifiable or rational basis for the court to reach any conclusion other than that the Orang Asli Jakun Kampung Peta plainly had the common law right to the claimed customary lands. Those pre-existing customary land rights, and thus prior ownership of native title over the claimed lands, were not impaired or in any way affected by subsequent legislative interventions including the NLC, and were protected by art 13 of the Federal Constitution. The respondents failed to establish the existence of any legislation which had clearly extinguished the prior common law customary land rights of the Orang Asli Jakun of Kampung Peta (see paras 54 & 63).

- A (3) The decision of the respondents, particularly the first respondent, to evict the Orang Asli Jakun of Kampung Peta (even if only from a section) by way of the notice under s 425 of the NLC, without affording the applicants an opportunity to be heard, was flawed and defective for being afflicted with errors of law and *Wednesbury* unreasonableness in the various aspects of illegality and procedural impropriety. Given the non-applicability of the NLC to native customary rights, the purported jurisdictional basis for the issuance of the notice was plainly misconceived, thereby rendering the decision in the notice ultra vires the NLC, the Aboriginal Peoples Act 1954 and the Federal Constitution. The notice was manifestly invalid for being afflicted with illegality and errors of law (see paras 82, 84–86 & 88).
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- D (4) The respondents had breached their fiduciary duty to the applicants and the Orang Asli Jakun Kampung Peta, principally in failing to ensure the entire customary lands were *gazetted* as aboriginal reserve or at least not included within the Endau-Rompin National Park and for their continued failure to take steps subsequently to exclude that part of the customary lands within the national park despite having knowledge of the fact of continuous occupation of the customary lands by the Orang Asli Jakun Kampung Peta and, more crucially, notwithstanding the recommendation by the fourth respondent or its predecessor as early as 1954 that the said lands should have been first *gazetted*, as well as more recently in 2010 that the lands should be returned to the rightful owner, being the Orang Asli Jakun Kampung Peta (see para 71).
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- G (5) The prayers relating to certiorari, certain declarations and mandamus were allowed. An official survey had to be undertaken by the relevant respondents immediately to draw up the formal boundaries of the customary lands of the Orang Asli Jakun Kampung Peta by using natural boundaries of rivers and hills and to procure the *gazetting* of the said customary lands to correspond as closely as possible to the area of the customary land asserted by the applicants as per their community map; the *gazette* exercise to be completed within 18 months at the cost to be borne by the relevant respondents. The prayer for a declaration that the respondents had breached their constitutional, statutory and fiduciary duties by failing to prevent the inclusion of parts of the customary lands into the Endau-Rompin National Park was unnecessary and was not allowed. Also disallowed were prayers for injunctions and damages. The injunctions were unnecessary, given the granting of the declarations on the customary land rights and there was no compelling basis to award damages to the applicants in the absence of evidence that they had suffered significant tangible loss (see paras 93 & 97).
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[Bahasa Malaysia summary]

Responden pertama telah mengeluarkan notis ('notis tersebut') yang ditampal pada pokok di Pantai Burung, yang terletak dalam Taman Negara Endau-Rompin Johor berkeluasan 25,295 hektar, yang menghendaki penceroboh merobohkan apa-apa struktur yang mereka telah bina atau sayur-sayuran yang mereka telah tanam dan untuk mengosongkan kawasan itu dalam tempoh 24 jam. Notis tersebut menyatakan jika mereka gagal untuk berbuat sepertimana diarahkan, sanksi keseksaan akan diambil terhadap mereka di bawah s 425 Kanun Tanah Negara ('KTN'). Walaupun notis tersebut dialamatkan 'to whom it may concern', pemohon-pemohon berhujah bahawa ia ditujukan kepada komuniti Jakun orang asli di Kampung Peta. Ini adalah kerana empat bulan sebelum notis tersebut dikeluarkan atas desakan responden ketiga, dia telah menulis kepada pemohon kedua meminta Jakun Kampung Peta dihalang daripada melapang, menanam dan menjalankan aktiviti lain dalam dan sekitar Pantai Burung dan untuk mengosongkan kawasan tersebut. Dalam menjawab surat tersebut, peguamcara pemohon-pemohon telah menulis kepada responden ketiga menegaskan bahawa pemohon-pemohon hanya menjalankan aktiviti-aktiviti atas tanah adat anak watan mereka dan memohon penjelasan tentang suratnya kepada pemohon kedua, yang tidak pernah sampai. Dalam permohonan mereka ini untuk semakan kehakiman untuk, antara lain, membatalkan notis tersebut, pemohon-pemohon telah memohon deklarasi-deklarasi bahawa Jakun Kampung Peta telah memegang hak-hak tanah adat ke atas beberapa tanah tertentu dalam dan sekitar Taman Negara Endau-Rompin ('taman negara tersebut') dan Kampung Peta; bahawa responden-responen tiada kuasa untuk membatalkan hak-hak tersebut tanpa membayar pampasan yang mencukupi dan bahawa, dalam apa keadaan, responden-repsonden mempunyai kewajipan fidusiari di bawah undang-undang untuk melindungi hak-hak tanah adat Orang Asli Jakun Kampung Peta. Selain daripada memohon pampasan dan ganti rugi serta injunksi-injunksi menghalang responden-responen daripada menceroboh ke dalam tanah-tanah adat mereka, pemohon-pemohon memohon perintah mandamus untuk memaksa responden-responen membatalkan warta mana-mana bahagian tanah-tanah adat tersebut yang di bawah hutan simpan taman negara dan untuk memulangkan penggunaan tanah-tanah tersebut kepada pemohon-pemohon dan Jakun Kampung Peta. Berdasarkan peta yang mereka telah tender sebagai keterangan, pemohon-pemohon berhujah bahawa Jakun Kampung Peta telah sejak dulu lagi berterusan mendiami atas kawasan 15,000 ekar yang ditandakan atas peta itu untuk aktiviti-aktiviti adat mereka seperti penanaman dan kediaman, memburu, memancing, mengutip hasil hutan dan menaikkan tapak-tapak upacara untuk penyembahan dan pengebumian. Pemohon-pemohon mengatakan bahawa apabila responden kelima dalam 1989ewartakan sebahagian besar hutan simpan yang telah menjadi Taman Negara, ia telah dicerobohi, dan telah membentuk, sebahagian daripada tanah-tanah adat dan

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- A kemudian chalet, bangunan dan pejabat telah dibina atas bahagian-bahagian tanah-tanah tersebut tanpa membayar apa-apa pampasan kepada Jakun Kampung Peta. Oleh kerana mereka telah memperoleh hak-hak tanah adat dalam common law, dan telah mendiami tanah-tanah adat itu tanpa pengetahuan, persetujuan dan malah 'consent' responden-responden
- B berkaitan, pemohon-pemohon berhujah bahawa hak-hak mereka tidak boleh dilemah atau dilenyapkan oleh KTN.

Diputuskan, membenarkan sebahagian daripada permohonan dengan kos sebanyak RM5,000:

- C (1) Pemohon-pemohon telah, atas imbalan kebarangkalian, berjaya membuktikan kes mereka untuk semakan kehakiman berhubung keputusan berkaitan notis s 425 KTN yang dipersoalkan oleh responden pertama. Berdasarkan keterangan, mereka telah membuktikan dengan
- D memuaskan isu nilai ambang berhubung penggunaan sebelum dan berterusan dan penghunian yang merupakan prasyarat untuk membuktikan hak-hak tanah adat. Pemohon-pemohon bukan sahaja menunjukkan bahawa aktiviti-aktiviti memburu, memancing dan mencari makan adalah elemen-elemen penting kepada adat dan
- E aktiviti-aktiviti tradisional Jakun Kampung Peta tetapi amalan-amalan sedemikian berjalın rapat dengan penggunaan dan kebergantungan mereka ke atas tanah-tanah tersebut yang mereka tuntutan sebagai keturunan nenek moyang dan bersifat adat dan telah menjadi sumber utama dan inti pati kewujudan mereka dan akan berterusan menjadi
- F penting kepada kehidupan masa depan mereka (lihat perenggan 61, 64 & 100).
- G (2) Berdasarkan keterangan afidavit yang mendorong, yang agak besar, dan sebahagian besarnya tidak dipertikaikan, tiada asas yang mewajarkan atau rasional untuk mahkamah mencapai apa-apa kesimpulan selain daripada Orang Asli Jakun Kampung Peta jelas mempunyai hak common law untuk menuntut tanah-tanah adat tersebut. Hak-hak tanah adat yang prawujud, dan oleh itu pemilikan terdahulu hak milik anak watan ke atas tanah-tanah yang dituntut itu, tidak berkurangan atau
- H dalam apa cara terjejas oleh campur tangan perundangan selanjutnya termasuk KTN, dan dilindungi oleh perkara 13 Perlembagaan Persekutuan. Responden-responden telah gagal membuktikan kewujudan apa-apa perundangan yang jelas melenyapkan hak-hak tanah adat common law terdahulu Orang Asli Jakun Kampung Peta (lihat perenggan 54 & 63).
- I (3) Keputusan responden-responden, khususnya responden pertama, untuk menghalau Orang Asli Jakun Kampung Peta (meskipun dari seksyen) melalui notis tersebut di bawah s 425 KTN, tanpa memberikan pemohon-pemohon peluang untuk didengar, telah cacat dan defektif

disebabkan kesilapan undang-undang dan ketidakmunasabahan *Wednesbury* dalam pelbagai aspek kepenyalahan undang-undang dan prosedur yang salah. Berdasarkan KTN tidak terpakai kepada hak-hak adat anak watan, asas perundangan yang dimaksudkan untuk keluaran notis tersebut jelas telah disalah tanggap, dengan itu menyebabkan keputusan dalam notis tersebut ultra vires KTN, Akta Orang Asli 1954 dan Perlembagaan Persekutuan. Notis tersebut jelas tidak sah kerana kepenyalahan undang-undang dan kesilapan undang-undang (lihat perenggan 82, 84–86 & 88).

- (4) Responden-responden telah melanggar kewajipan fidusiari mereka terhadap pemohon-pemohon dan Orang Asli Jakun Kampung Peta, terutamanya kerana gagal memastikan keseluruhan tanah-tanah adat tersebut diwartakan sebagai rizab orang asli atau sekurang-kurangnya termasuk dalam Taman Negara Endau-Rompin dan kerana kegagalan berterusan mereka untuk mengambil langkah selanjutnya untuk mengecualikan bahagian tanah-tanah adat tersebut yang dalam taman negara meskipun mempunyai pengetahuan tentang fakta penghunian berterusan atas tanah-tanah adat tersebut oleh Orang Asli Jakun Kampung Peta dan, lebih penting, meskipun syor oleh responden keempat atau nenek moyang mereka seawal 1954 bahawa tanah-tanah tersebut hendaklah diwartakan terlebih dahulu, dan juga lebih terkini dalam 2010 bahawa tanah-tanah tersebut patut dipulangkan kepada pemilik yang sah, iaitu Orang Asli Jakun Kampung Peta (lihat perenggan 71).
- (5) Permohonan berkenaan certiorari, deklarasi tertentu dan mandamus dibenarkan. Kaji selidik rasmi telah dijalankan oleh responden-responden berkaitan dengan segera untuk membuat sempadan rasmi tanah-tanah adat Orang Asli Jakun Kampung Peta dengan menggunakan sempadan semula jadi sungai dan bukit dan untuk memperoleh pewartaan tanah-tanah adat tersebut untuk sesuai seberapa dekat mungkin bagi kawasan tanah adat yang ditegaskan oleh pemohon-pemohon mengikut peta komuniti mereka; pelaksanaan warta akan siap dalam tempoh 18 bulan pada kos yang perlu ditanggung oleh responden-responden berkaitan. Permohonan untuk deklarasi bahawa responden telah melanggar tanggungjawab perlembagaan, berkanun dan fidusiari mereka kerana gagal untuk mencegah kemasukan bahagian tanah adat ke dalam Taman Negara Endau-Rompin adalah tidak perlu dan tidak dibenarkan. Juga tidak dibenarkan adalah permohonan untuk injunksi dan ganti rugi. Injunksi adalah tidak perlu, memandangkan pemberian deklarasi mengenai hak tanah adat dan tidak ada asas yang menarik untuk ganti rugi kepada pemohon-pemohon jika tiada bukti bahawa mereka telah mengalami kerugian besar yang ketara (lihat perenggan 93 & 97).]

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A Notes

For cases on right to customary land, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 3389–3395.

Cases referred to

- B** *Abu Bakar bin Pangis & Ors v Tung Cheong Sawmill Sdn Bhd & Ors* [2014] 5 MLJ 384, CA (folld)
- Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418, HC (refd)
- C** *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, CA (refd)
- Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766, FC (refd)
- Bromley London Borough Council v Greater London Council and another* [1983] 1 AC 768, HL (refd)
- D** *Caxton (Kelang) Sdn Bhd v Susan Joan Labrooy & Anor* [1988] 2 MLJ 604 (refd)
- Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, HL (refd)
- E** *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101, FC (refd)
- Delgamuukw v British Columbia* [1997] 3 SCR 1010, SC (refd)
- Frame v Smith and Smith* [1987] 2 SCR 99 (refd)
- Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417; [1991] 2 CLJ 881, SC (refd)
- F** *Kent and Porter v East Suffolk Rivers Catchment Board* [1939] 4 All ER 174, CA (distr)
- Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158, CA (refd)
- G** *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289, CA (refd)
- Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152, FC (refd)
- Khoo Cheng (P) & Ors v Pentadbir Tanah Muar* [2006] MLJU 641; [2008] 3 CLJ 534, HC (refd)
- H** *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234, FC (refd)
- Mabo and others v Queensland (No 2)* (1992) 175 CLR 1, HC (refd)
- Madeli bin Salleh (suing as administrator of the estate of Salleh bin Kilong, deceased) v Superintendent of Lands and Surveys, Miri Division & Anor* [2005] 5 MLJ 305, CA (refd)
- I**

- Majlis Perbandaran Pulau Pinang v Syed Ahmed all MM Gouse Mohamed* [2007] 1 MLJ 42; [2007] 1 CLJ 547, CA (refd) **A**
- Malaysia Airline System Bhd v Wan Sa' adi @ Syed Sa' adi bin Wan Mustafa* [2015] 1 MLJ 757; [2015] 1 CLJ 295, FC (refd)
- Mohamad bin Nohing (Batin Kampung Bukit Rok) & Ors v Pejabat Tanah dan Galian Negeri Pahang & Ors* [2013] 5 MLJ 268, HC (refd) **B**
- Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, CA (folld)
- Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241, HC (refd)
- Pengarah Tanah dan Galian Johor dan satu lagi lwn Khalip bin Bachik dan satu lagi* [2013] 1 MLJ 799; [2013] 5 CLJ 639, HC (refd) **C**
- Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489, CA (refd)
- Petroliaam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288, FC (refd)
- R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 AMR 433; [1997] 1 CLJ 147, FC (refd) **D**
- Saeng-Un Udom v Public Prosecutor* [2001] 3 SLR 1, CA (refd)
- Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591, HC (refd)
- Sh Jilubhai Nanbhai Khachar Etc v State of Gujarat And Anr* AIR 1995 SC 142, SC (refd) **E**
- Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256, CA (refd)
- Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd) **F**
- Superintendent of Lands and Surveys Department Sibn Division & Anor v Usang ak Labit & Ors and another appeal* [2014] 3 MLJ 519, CA (folld)
- Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, CA (refd) **G**

Legislation referred to

- Aboriginal Peoples Act 1954 s 6
- Evidence Act 1950 s 48
- Federal Constitution arts 8(5)(c), 13, 44, Items 2, 16, Ninth Schedule, Federal List, List 1, State List **H**
- Government Proceedings Act 1956 s 7, 7(2)
- National Land Code ss 4(2)(a), 425, 425(1)
- National Parks Act 1980
- National Parks (Johor) Corporation Enactment 1989
- Rules of Court 2012 O 53 rr 1(2), 2(2), 2(3) **I**
- Specific Relief Act 1950 s 44(1), 44(1)(b), Chapter VIII, Part 2

A *Rajkumar Mathusuthanan (Yogeswaran Subramaniam and K Mohan with him) (Law Raj Teh & Partners) for the applicants.*
Nurul Izalina bt Rajaai (Johor State Legal Advisor Office) for the first, second, third and fifth respondents.

B Mohd Nazlan JC:

APPLICATION

C [1] This is an application for judicial review by way of an order of certiorari to quash a notice dated 17 January 2012 issued under s 425 of the National Land Code ('the NLC') by Pentadbir Tanah Daerah Mersing, the first respondent, which required trespassers to vacate the Endau Rompin National Park by the day after on 18 January 2012 ('the notice') and demanded the demolition of any structures built within the said park. Although not specifically identified in the notice, the applicants contended that the same was directed at the Orang Asli Jakun of Kampung Peta.

D [2] The applicants are also, in the same judicial review proceedings, seeking various other remedies, including declaratory relief in relation to the customary rights of the Jakuns of Kampung Peta in respect of their customary land in and around the Endau Rompin National Park and Kampung Orang Asli Peta ('Kampung Peta') which area is set out in the community map ('the customary lands') exhibited as exh 'KP1' to the affidavit-in-support of the second applicant. In summary, their prayers as per encl 1 are mainly for the following:

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- (i) an order for certiorari for the notice be quashed;
 - (ii) a declaration that the applicants hold customary land rights over the customary lands;
 - G** (iii) a declaration that the respondents have no authority to extinguish the customary land rights of the applicants without adequate compensation;
 - H** (iv) a declaration that the applicants are entitled to the protection of their customary land rights by the respondents given the fiduciary duties owed by the latter;
 - (v) a declaration that the respondents had breached their constitutional, statutory and fiduciary duties by their failure to prevent the inclusion of parts of the customary lands into the Endau Rompin National Park;
 - I** (vi) an order of mandamus to compel the respondents to *de-gazette* any parts of the customary lands under forest reserve;

- (vii) an order of mandamus to compel the return of the relevant parts of the customary lands to the applicants and Orang Asli Jakun of Kampung Peta; **A**
- (viii) a declaration that the notice does not extinguish the customary land rights of the applicants in respect of the customary lands; **B**
- (ix) a declaration that the notice is void and is of no effect;
- (x) an injunction to prevent the respondents from evicting Orang Asli Jakun of Kampung Peta from their customary lands and from demolishing their building structure thereon; **C**
- (xi) an injunction to prevent the respondents from restricting access for the applicants and Orang Asli Jakun of Kampung Peta to their customary lands;
- (xii) an order for payment of compensation for any acquisition by the respondents of any parts of the customary lands; and **D**
- (xiii) damages for losses suffered by the applicants.

KEY BACKGROUND FACTS

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[3] This judgment discusses the law on native customary rights vis a vis the ancestral lands of the *orang asli* in Peninsular Malaysia and the application of judicial review proceedings in situations where there are violations of such rights.

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[4] The applicants instituted this application on behalf of themselves and in a representative capacity on behalf of other residents of Kampung Peta. They are members of the 'Jakun' sub-ethnic group of the indigenous aboriginal 'Orang Asli' community of the Malay Peninsula.

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[5] The applicants reside in the interior of south-east Pahang and in Johor. The instant dispute concerns what is claimed to be the customary ancestral lands of the Jakuns in Ulu Endau area, Johor, which is demarcated by the green boundaries in the map in the annexure to the notice of application and which is also exhibited as 'exh NK3' to the affidavit-in-support (the 'community map') and which measures approximately 15,000 acres. The applicants contended that the Orang Jakun have continuously occupied the demarcated area since time immemorial or at least the 1940s, and carried out their customary activities in the area (such as hunting, fishing, collecting forest produce and erecting ceremonial sites for worship and burial).

H**I**

- A [6] The customary lands which are said to be the customary ancestral lands of the Jakuns of Kampung Peta and demarcated in the said community map include, inter alia, the following villages:
- (a) Kampung Orang Asli Ulu Endau;
- B (b) Kampung Orang Asli Kg Temiang;
- (c) Kampung Orang Asli Kg Padang Iwah;
 - (d) Kampung Orang Asli Kg Gaban;
- C (e) Kampung Orang Asli Kg Chenggal Rambutan;
- (f) Kampung Orang Asli Kg Kuala Jasin; and
 - (g) Kampung Orang Asli Kg Pantai Burung.
- D [7] The applicants thus argued that the Jakuns of Kampung Peta (together with their ancestors) have continuously occupied the customary lands from time immemorial and maintained, in accordance with Jakun laws and customs, a traditional connection with these lands in the aforementioned areas in Mersing, Johor.
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- F [8] Further, the Jakun of Kampung Peta (including their said ancestors) have, continuously cultivated and resided on, and have exercised customary and proprietary rights, in and over the customary lands. In this regard, they built dwelling places, planted orchards, buried their dead, practiced their laws and customs and existed as an established community on the said customary lands.
- G [9] In 1989, 547 acres of the Kampung Peta region was *gazetted* as aboriginal land under s 6 of the Aboriginal Peoples Act 1954 by the fifth respondent, being the Johor State Government ('*gazetted* land').
- H [10] However, the *gazetted* land constitutes what the applicants considered only a part of the customary entitlement of the applicants in the customary lands and does not include other areas of land ('*ungazetted* land') that have also been continuously occupied, used and enjoyed by the applicants, and by their ancestors earlier in time.
- I [11] Thus the *gazetted* land at Kampung Peta did not include other parts of Kampung Peta as well as the remainder of the applicants' customary ancestral lands in the demarcated area (ie 15,000 acres – 547 acres = 14,453 acres). This balance (ie 14,453 acres) of *ungazetted* land, as contended by the applicants, also forms part of customary ancestral lands of the applicants which they have continuously occupied as well as used for their customary activities. As such,

the customary lands claimed by the Jakuns of Kampung Peta in this case comprises the *gazetted* land and the *ungazetted* land. A

[12] The applicants submitted that the *gazetted* land does not encompass the entire customary lands of the Jakun of Kampung Peta. More particularly, the *ungazetted* land include other lands around Tapak Sungai Jaler, Pantai Burung, Kuala Jasing and others which have been continuously cultivated and occupied by the Jakuns of Kampung Peta and had always, from their perspective, formed part of the customary lands. B

[13] In the same year of 1989, the Johor State Government ('the fifth respondent'), *gazetted* 25,295 hectares of land as state forest reserve now known as Taman Negara (Johor) Endau Rompin ('the Endau Rompin National Park') under the National Parks (Johor) Corporation Enactment 1989. C

[14] The applicants contended that the *gazetting* of the Endau Rompin National Park had also failed to take into consideration the customary entitlement of the applicants and in effect encroached into the customary lands of the Jakuns of Kampung Peta. D

[15] It is the case of the applicants that the Endau Rompin National Park was created over part of the *ungazetted* (14,453 acres) customary ancestral lands of the applicants and therefore constituted an encroachment into and trespass of the applicant's customary lands. E

[16] Some years later, in or about 1993, Perbadanan Taman Negara Johor ('the third respondent') acting by itself or in collaboration with either one or all other respondents, had erected structures including chalets, buildings, offices ('the structures') on the parts of the customary lands situated within the Endau Rompin National Park. This was undertaken without any payment of compensation to the Jakuns of Kampung Peta. F G

[17] Several years later on 15 September 2011, the third respondent delivered a letter dated 6 September 2011 to the second applicant which contained a request that the Jakuns of Kampung Peta refrain from clearing, cultivating and carrying out activities in and around Pantai Burung, which falls within the areas of the *ungazetted* land. Upon receiving the letter from the third respondent to vacate the said area, the second applicant made inquiries with the fourth respondent and obtained documentation which they contended supports their claim over the customary lands. The applicants' solicitors then wrote to the third respondent seeking clarification on the latter's letter of 6 September 2011. No response was forthcoming. H I

[18] The third respondent instead issued a letter dated 16 January 2012 to

- A the first respondent, seeking the latter's cooperation to institute enforcement action against what was alleged to have been a trespass in the said area around Pantai Burung. This, the next day resulted in the issuance of the notice by the first respondent. The notice in contention entitled 'Notis Perintah Supaya Keluar daripada kawasan Taman Negara Johor Endau-Rompin (PETA)' was
- B issued by the Pejabat Tanah Daerah Mersing ('the first respondent') and affixed onto a tree in the Pantai Burung area. The said notice reads as follows:

PEJABAT TANAH DAERAH MERSING

86800 MERSING, JOHOR.

- C NOTIS PEMBERITAHUAN ATAS PENCEROBOHAN TANAH KERAJAAN
DI DAERAH MERSING.

No. Fail: (18)dml.PTD.(MG)05/00/01/0908/0033/2011

Tarikh: 17 Januari, 2012.

- D KEPADA SESIAPA YANG BERKENAAN,
NOTIS PERINTAH SUPAYA KELUAR DARIPADA KAWASAN
TAMAN NEGARA JOHOR ENDAU-ROMPIN (PETA)

- E Merujuk perkara di atas, adalah dengan ini dimaklumkan bahawa tuan / puan didapati telah melakukan pencerobohan atas tanah kerajaan sebagaimana di atas. Ini bermakna tuan / puan telah melakukan satu kesalahan di bawah Seksyen 425 (1) dan (1a) Kanun Tanah Negara (KTN) dan boleh diambil tindakan di bawah seksyen tersebut yang jika disabitkan kesalahan boleh dikenakan denda tidak melebihi RM10,000.00 (RM SEPULUH RIBU SAHAJA) atau tidak melebihi 1
- F tahun (SATU TAHUN) penjara ATAU kedua-duanya sekali.

- Tuan / Puan adalah dinasihatkan supaya memberhentikan apa-apa bentuk pencerobohan serta keluar meninggalkan tanah tersebut dalam tempoh 1 HARI dari tarikh surat ini dengan membuka sendiri segala binaan / bangsal / bangunan / pondok / pancang bot / jeti atau apa-apa jua bentuk tanaman yang telah ditanam di
- G atas tanah.

2. Jika arahan ini tidak dipatuhi, tindakan penguatkuasaan ke atas bangunan atau tanaman tuan / puan akan dilaksanakan bagaimana peruntukan di bawah Seksyen 425 (A) 1 Kanun Tanah Negara (KTN). Pentadbiran ini akan meroboh / menghapus atau memusnahkan apa-apa bangunan atau tanaman serta tuan / puan akan didakwa dan dihadapkan ke mahkamah serta dikenakan denda sebagaimana
- H tersebut di atas.

Sekian terima kasih.

BERKHIDMAT UNTUK NEGARA

- I t.t
(JAMALUDIN BIN HAJI A.HAMID),
Pentadbir Tanah,
Mersing.

SUMMARY OF THE SUBMISSION BY THE APPLICANTS

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[19] The central thrust of the case for the applicants, in the main, is anchored on the primary contention that the applicants have acquired native *orang asli* customary land rights at common law in respect of the customary lands where they have occupied and maintained traditional connection with the lands in accordance with their custom and practices. On the authority of leading cases on the subject such as *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 (affirmed by the Court of Appeal in *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158) and the Court of Appeal decision in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289, this common law customary land rights pre-exists and is not subject to the National Land Code.

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[20] It is thus the submission of the applicants that the issuance of the said notice, which is expressly stated to be pursuant to s 425(1) of the NLC to be an error of law since NLC is not applicable to the land in question.

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[21] The relevant respondents had therefore failed to consider the rights and interests of the applicants and the Jakuns of Kampung Peta as holders of customary land rights, nor afford an opportunity to the applicants to be heard in respect of such rights prior to arriving at the decision to issue the notice. Furthermore, the relevant respondents had themselves already earlier consented in writing for the Jakuns of Kampung Peta to continue occupying among others, Pantai Burung, being the area in question. This is borne out by specifically, firstly, the affidavit-in-reply for the fourth and sixth respondents affirmed by Ketua Pengarah Jabatan Kemajuan Orang Asli Malaysia ('JKOAM'), confirming that the Jakuns of Kampung Peta had lived in the relevant areas, including Pantai Burung even prior to the *gazetting* of Kampung Peta as aboriginal reserved land. The affidavit also affirmed that the Jakuns of Kampung Peta had occupied some 100 acres of land already ventured by them which although was not made part of the *gazetted* land, and in fact included in the Endau Rompin National Park, the same would remain to be protected. Indeed, the affidavit even confirmed that the area said to be worked on by the applicants was within the scope of the approval earlier granted by the third respondent, all of which, the applicants submitted have the effect of at the very least, creating a legitimate expectation that the Jakuns of Kampung Peta would be consulted or at least afforded the opportunity to be heard on matters relating to their customary lands.

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[22] The applicants further contended that the relevant respondents, namely the first, second, fourth, fifth and sixth respondents all owe a fiduciary duty under the law as provided in the Federal Constitution and the Aboriginal Peoples Act 1954 to protect the interests of the *orang asli*, including in

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A particular in respect of the applicants' native customary title to the customary lands.

[23] In addition, it was further highlighted by the applicants that the fact that the notice was issued by the first respondent only 24 hours after the letter of instruction from the third respondent of 16 January 2012 to the first respondent to take enforcement action against the alleged trespass and posted on a tree at a relatively inaccessible location suggests that the notice was issued in haste. The issuance rode roughshod over the rights of the applicants who had always occupied the said customary lands even with the knowledge, acquiescence as well as 'consent' of the relevant respondents. Equally of importance, the applicants submitted that they were rightfully entirely dependent on the respondents to safeguard their interests in the first place.

D SUMMARY OF THE CONTENTION OF THE RESPONDENTS

[24] The respondents on the other hand maintained that the notice was properly issued in exercise of the general powers of the state director, registrar or land administrator; it concerned only an area which is outside the *gazetted* land, and that the notice was only intended for those Jakuns of Kampung Peta who had cleared an area of about 20 acres in size to develop and cultivate a rubber plantation, to cease such activities. The notice was certainly not a direction for all Orang Asli Jakun Kampung Peta to leave their settlement located within the Endau Rompin National Park.

F [25] The respondents significantly argued that the applicants' customary title and rights have been extinguished by law, predominantly by reason of the creation of the Endau Rompin National Park, and that the applicants had failed to prove continuous occupation over their claimed customary lands for there was lack of exclusivity and control, because there is insufficient measure of control to prevent strangers from interfering, partly attributed to the erection of the said structures on the customary lands and the clearance of trees without any payment of compensation to the applicants.

H [26] The fourth and sixth respondents, being a federal government agency and the federal government, respectively, further contended that they had discharged their public duties under the Federal Constitution and the Aboriginal Peoples Act 1954, disputing however that there exists any constitutional or statutory obligation on the part of the federal government to grant the applicants rights to the development land or to *gazette* land as aboriginal reserve in the absence of clear language to that effect in the Federal Constitution, more so as the granting of land rights is a state matter in accordance with Item 2 of State List in the Ninth Schedule to the Federal Constitution.

[27] All of the respondents thus contended that if such fiduciary duty existed, it had been discharged in accordance with the Federal Constitution and the Aboriginal Peoples Act 1954, and further argued that even if there had been a failure, such non-feasance is not actionable by virtue of s 7 of the Government Proceedings Act 1956. The said respondents also submitted that the applicants have failed to prove the existence of a fiduciary duty on the part of the respondents in accordance with the test as propounded in *Frame v Smith and Smith* [1987] 2 SCR 99 which stated that:

... Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[28] The respondents also submitted that the reliefs prayed for by the applicants in respect of their customary rights over a certain unspecified area of land as produced in the community map is unnecessary and far reaching without any definitive demarcation of the relevant areas. It is therefore giving rise to uncertainty and of doubtful utility and usefulness. The respondents referred to authorities such as *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234 and *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 in support of such contention. The respondents also argued that the applicants have not fulfilled the test justifying the granting of a declaratory relief as stated in *Caxton (Kelang) Sdn Bhd v Susan Joan Labrooy & Anor* [1988] 2 MLJ 604.

[29] The respondents further argued that the order for mandamus to *de-gazette* areas within the Endau Rompin National Park or restore customary lands to the applicants cannot be founded on s 44(1) of the Specific Relief Act 1950 as there is no legal duty imposed on the respondents governing the claim of the applicants, thus not fulfilling the requirement of O 53 r 1(2) which stipulates the need for adherence to Chapter VIII of Part 2 of the Specific Relief Act 1950 concerning performance of public duties. The respondents' stance is that the National Parks Act 1980 does not impose any duty on the respondents to *de-gazette* any part of the customary lands or to restore that of the said customary lands to the applicants.

A THE LAW ON INDIGENOUS LAND RIGHTS

- [30] The position in respect of native customary land rights of the *orang asli* in Malaysia may now be considered as settled law to the extent that the principles have been established by case law authorities, particularly by the quartet of the leading cases of *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 (*Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158 (CA)), *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591 (*Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 (CA)), *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 (*Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256 (CA)) and *Madeli bin Salleh (suing as administrator of the estate of Salleh bin Kilong, deceased) v Superintendent of Lands and Surveys, Miri Division & Anor* [2005] 5 MLJ 305 (*Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509 (FC)). The key principles of law that may be distilled from these cases which are of relevance to the instant application may be stated as follows:
- E (a) the *orang asli* have a common law right to their ancestral land provided there is a continuous and unbroken occupation and enjoyment of rights to the land since time immemorial;
 - (b) the common law rights to their customary land pre-exist and thus pre-date the Aboriginal Peoples Act 1954 and National Land Code (the NLC). Indeed, the Crown's acquisition of sovereignty did not interfere with native customary land rights. The Aboriginal Peoples Act 1954 thus complements and does not extinguish customary land rights and the NLC has no application over such customary land right (see *Sagong bin Tasi* and s 4(2)(a) of the NLC). It is a form of a right acquired in law and not based on any document of title;
 - F (c) the common law customary land rights of the *orang asli* or native customary title is *sui generis* and is a right over the land inclusive of the right to live on their land as their forefathers had lived, as would their future generations, the right to move about freely without disturbance or interference and the right to the produce of the land;
 - H (d) the customary land right however does not involve the right to the land in the sense that the *orang asli* cannot convey, lease out or rent the land. However, the customary rights over land is a form of proprietary rights within the scope of art 13 of the Federal Constitution and therefore enjoy constitutional safeguard against deprivation of the proprietary customary land rights without compensation. The extinguishment or deprivation of such rights can only be made for public purposes by legislative provisions in terms free from any ambiguity, and after
 - I

- payment of compensation. Mere implication is insufficient; A
- (e) native customary title represents a community title of a permanent nature and is identifiable by reference to the traditional customs and laws of the community. The *orang asli* native title and customary rights in turn is determined by showing their continuous use and occupation of land; B
- (f) the test of occupation is the existence of sufficient measure of control to prevent strangers from interfering. Actual physical presence is however not a pre-requisite to establish continuous use and occupation; C
- (g) the ascertainment of the specific rights associated with native customary title requires a scrutiny of the custom and practices of each individual community. As is the case for determining 'occupation', the custom and practice can only be considered as a matter of proof based on the evidence adduced; D
- (h) given the established proposition that the custom and traditions of a particular *orang asli* community determine whether there is occupation and continuous use of the customary lands, which in turn defines the nature and extent of their customary land rights as recognised under common law, such rights may extend beyond the settlement areas of the community and may be coterminous with the lands used for roaming, hunting and foraging, if the customs and activities of the community is proven to include such foraging activities; E
- (i) the federal and state governments owe a fiduciary duty to protect the welfare of the *orang asli*, including their land rights, and not to act in any manner inconsistent with those rights, as well as to provide remedies where an infringement occurs (see also Federal Court case of *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766). This fiduciary duty is founded among others on constitutional and statutory provisions such as firstly, art 8(5)(c) of the Federal Constitution which sanctions an exception to the equality principle in relation to provisions for the protection, well-being or advancement of the aboriginal people of Malay Peninsular (including reservation of land); secondly, Item 16 of the Nineth Schedule in List 1 – Federal List empowering the federal government to promulgate laws for the welfare of the aborigines; and thirdly, the Aboriginal Peoples Act 1954 itself, which object as stated in its preamble is expressly to provide for the protection, well-being and advancement of the aboriginal peoples of Peninsular Malaysia; and F
- (j) a failure to *gazette orang asli* reserved land may constitute a breach of such fiduciary duty. G
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A THE EXTENT OF THE APPLICANTS' NATIVE TITLE TO THEIR
CUSTOMARY LANDS

(i) *The test of continuous occupation*

B [31] Having stated the foregoing propositions of law, it is now apposite for me to consider the position of the applicants in relation to their claim to native customary rights before I touch on the validity of the notice issued under s 425 of the NLC by the first respondent.

C [32] I do not find the fact that the *orang asli* of Kampung Peta being members of the 'Jakun' indigenous community to be in dispute. Exhibit SC2 (encl 13) of the affidavit in reply by the second applicant showed a document entitled *Orang[b2] Asli Johor* prepared by Jabatan Hal Ehwal Orang Asli Johor issued in September 1961 classifying *orang asli* living in Mersing area, including specifically Kampung Peta, as Jakun. The underlying bone of contention in the instant application however, is the extent of the customary land rights of the applicants, with the respondents recognising only the *gazetted* land.

E [33] Whilst it can safely be stated that the proposition of law on native customary land rights is fairly settled, in that the law recognises that the common law rights embodied in native title of indigenous peoples in Malaysia over their customary lands are to be respected, a related but crucial issue of no less importance, given its practical relevance is the determination of the extent of such native rights over the subject customary land. This is in turn significantly dependent on the issue whether the natives occupy and maintain a traditional connection with the said customary land in accordance with their custom and usages. The very foundation of the rights of natives and aborigines to their customary land is therefore the fact of continuous use and occupation of the same. Occupation of the customary lands claimed by the applicants in the instant case as such is the *sine qua non* and absolutely central to establishing the all-important native customary rights.

H [34] The test of establishing 'occupation' is most authoritatively enunciated by Arifin Zakaria FCJ (as His Lordship then was) in *Madeli bin Salleh* in the following fashion:

I On the issue of what is meant by 'occupation', we agree with the view of the Court of Appeal that actual physical presence is not necessary. There can be occupation without physical presence on the land provided there exist sufficient measure of control to prevent strangers from interfering: See *Newcastle City Council v Royal Newcastle Hospital* [1959] 1 All ER 734 which was followed by the local case of *Hamit Matusin & Ors v Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 1524; [1991] 2 CLJ Rep 677. Therefore, following the above authorities, the fact

that the respondent ceased to live on the land prior to the fire which gutted the house on the land in 1941 that does not mean that he ceased to be in occupation of the said land. The evidence before the court clearly established that he continued to exercise control over the said land after the said period. The respondent could not, therefore, be said to have lost his right or interest over the said land by reason of abandonment or non occupation of the said land.

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[35] It is therefore clear that it is not necessary that there must be actual physical presence to show occupation of the customary lands, for there can also be occupation under the law vis a vis native customary land rights if there is sufficient measure of control preventing strangers from intrusion or interference. It is imperative to note that there are two crucial aspects to this test of occupation. The first is occupation by physical presence which in my view is best evidenced by the existence of settlement areas such as villages and residential sites as well as cultivated lands. The second is occupation in respect of the areas extending beyond such physical settlements, where the focus is on the aspect on the continuous use of the land by the *orang asli* in accordance with their custom, to the exclusion of third parties encroaching into the area in question. In my view, this second aspect is the one which concerns the areas for hunting, roaming and foraging. In both situations however, the critical issue is one of evidence and proof.

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[36] I shall deal with both situations of occupation also because the applicants' case is not only that the notice has the effect of encroaching on their land rights at especially the area of Kampung Peta in Pantai Burung, but that a declaration is sought in respect of their ancestral land rights to the entire *gazetted* land as well as the more sizeable *ungazetted* land, extending to the seven areas as specified earlier in this judgment and their surrounding areas (as demarcated per the community map exhibited to the affidavit of the first applicant).

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(ii) Evidence of continuous occupation of customary lands

[37] The second applicant averred in his affidavit that the Jakuns of Kampung Peta and their ancestors have occupied the customary lands located within the Ulu Endau and the Kinchin River area from time immemorial. They had occupied and cultivated Pantai Burung, Ulu Endau, Temiang, Padang Iwah, Gaban, Chenggal Rambutan and Kuala Jasin, and continue to occupy these areas and other areas within the customary lands through the maintenance of their traditional activities, including harvesting and tending to their cultivation and orchards, collection of forest produce, hunting and fishing, the maintenance of gravesites and the conduct of traditional ceremonies at sacred sites (*keramat*).

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- A [38] From the said affidavit, it is further affirmed that the Jakun of Kampung Peta continue to occupy the areas known as Batu Gajah and Kuala Lamakoh, both located within the customary lands. The maternal aunt of the second applicant, Som bt Rangik, aged around 90, was born and is residing in Kuala Lamakoh. The settlement at Kuala Lamakoh was relocated in the 1950s but
- B they continue to occupy this area through the maintenance of their traditional activities.
- C [39] According to the Jakuns' oral histories, Som bt Rangik's grandfather was Batin Lepar, who was the Batin of Kampung Peta (also then known as Iwah) prior to the Japanese occupation. There were five subsequent Batins whom the second applicant has knowledge of after Batin Lepar, before the second applicant himself was appointed as Batin of Kampung Peta in 1996; namely, Batin Perang, Batin Besar, Batin Jajah ak Janang, Batin Ali (who passed away in
- D 1965) and Batin Tiam.
- E [40] The community map was prepared by the applicants and is said to be premised on the areas relevant to the adoption of the use of their ancestral custom with particular reference to prominent ancestral landmarks and sites at hills, mountains, rapids, rivers and confluence. The entire customary lands of Kampung Peta is about 7,450 hectares (18,410 acres) and with a boundary circumference of approximately 47.5km in distance.
- F [41] The first applicant exhibited pictures, among others, which show that the Jakuns of Kampung Peta had occupied in and around the areas identified as Tapak Sungai Jaler and Pantai Burung which are situated within the customary lands as depicted in the community map, highlighting in particular, pictures of burial and holy ancestral sites at Pantai Burung and rubber plantations. This exh KP2 attempts to explain the history of how Kampung Peta came to be
- G known as such, and emphasises the importance of Endau River as the key mode of transportation of the Jakuns of Kampung Peta who in the 1950s had to travel the length of the Endau River, from its headwaters to Endau town to buy basic necessities and provisions in exchange for items such as rattans, in a journey that could take four to five days either way. Their trips on wooden boats would
- H pass villages such as Kampung Punan, Kampung Tanah Abang, Kampung Tanjung Tuan, Kampung Meletong, Kampung Denai and Kampung Labong before reaching Endau town and the Jakuns would also fish during the journey.
- I [42] These pictures, which illustrate the occupation and use of land in the area of Kampung Sungai Burung which is the subject area targeted by the notice, are not challenged by the respondents in any of their submission. In fact, the affidavit in reply of the fourth and sixth respondents, affirmed by the Ketua Pengarah of JKOAM (encl 10) admitted the statement in para 22 (of the affidavit of the second applicant), which contains the pictures as per exh KP2.

[43] The affidavit in reply of the second applicant, being the Tok Batin himself contains further averments on the oral history of the Jakuns of Kampung Peta, their local laws, custom and traditions which are integral to the use of the lands and waters within the customary lands. Ceremonies such as funeral rites, including location of gravesites (which according to their custom should not be moved) are very closely linked to the customary lands. So too would the spirit-appeasing ceremony of 'bela hutan' be, and the same can be said in respect of the spiritual cleansing by ritual bathing, commonly performed at the sacred site of Jeram Bungsu Pacau which is also located within the *ungazetted* land (supported by pictures shown in exh SC6 to the affidavit in reply of the second applicant in encl 13).

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[44] Other sacred ancestral sites are averred to be at Pantai Burung itself, specifically the grave of Nenek Panjang Berjanggut, a large rock in Batu Gajah, rapids at Kuala Lamakoh and Pengkalan Pak Baluk at Lubuk Ewah, all of which locations are within the *ungazetted* land part of the customary lands, and are marked in the community map.

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[45] In respect of land tenure, it was averred by the second applicant that the customary lands are possessed, occupied, used and enjoyed for the benefit of the Jakuns of Kampung Peta, where according to their laws and customs, entry into the customary lands by any outsider, including Jakuns who do not have kinship ties with the Jakuns of Kampung Peta, requires express permission. Durian trees had also been planted along both sides of the Endau River within the customary lands. These trees have been inherited and are owned by individual members of the community as is the case with old swiddens and rubber trees that are located within the *ungazetted* land of the customary lands.

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[46] Further affidavit evidence on the aspect of traditional relationship with the land is that the Jakuns of Kampung Peta rely on the collection of forest produce such as rattan and bamboo for traditional, commercial and subsistence purposes. These products are thus essential to their livelihood and deemed integral to their culture. For example, bamboo is utilised for amongst other purposes, the building of traditional homes and structures and to build the Pelanta Air Panchoh in the Air Panchoh ceremony.

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[47] It is useful if I further reproduce below the relevant parts of the affidavit of the second applicant (in paras 29–32) which provides greater emphasis on what in my view appears to suggest a strong existence of an intertwining element or connection between the life of the Jakuns of Kampung Peta and their use of the land and its produce within the customary lands:

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Traditional and subsistence hunting is essential to our livelihood, well-being and life and is conducted within the Customary Lands using, among other things, nyumpit (blowpipes), jirat (snares) and lembing (spear). Once again, we rely on our

- A** Customary Lands to make most hunting equipment. For example, the nyumpit is carved from kayu tepinis or mesawa. The damak (dart) for the nyumpit is made from the habong tree while the poison for the damak is extracted from the rengkek tree or root of the Ipoh tree.
- B** The Jakun of Kampung Peta also traditionally fish and trap tortoises along the Endau River and its tributaries located within the Customary Lands. Fish are angled, speared, trapped using lukah (made from woven rattan) or paralysed using nuba (juice of deris or jangiut root) and speared.
- C** We use wood from the chengai tree to carve the hull of our traditional boats (perahu). Other types of wood including those from the penok, merbau, kepong, merawan and gerunggung trees located within the Customary Lands are used to complete the construction of the perahu.
- D** The Customary Lands are also an invaluable source of traditional medicine for the Jakun of Kampung Peta. Parts of various plants located or grown on the Customary Lands are utilised to cure ailments or for general good health. For example, the decoction of the root of the purut keletong plant is used to cure coughs. Drinking a decoction of root of the pengesep plant alleviates internal body pains, breathing difficulties and bloody coughs. The decoction of the serapat root is a general health tonic for women. The root of the lembe hitam, if eaten raw, reduces hot fever. In the mid-1980s, I assisted the Malayan Nature Society to record more than 50 types of herbal medicine used by the Jakun of Kampung Peta.
- E**
- [48]** In addition to the affidavit evidence of the applicants concerning occupation and settlement of the Orang Asli Jakun Kampung Peta which are not credibly disputed by the respondents, the evidence particularly that of the second applicant, being the Headman or Tok Batin of the Orang Asli Jakun Kampung Peta which by his affidavit narrated the oral histories of the Orang Asli Jakun Kampung Peta, their the practices, custom and traditions, as well as their connection with the use of the customary lands, and that of continuous occupation, ought to be construed as relevant pursuant to s 48 of the Evidence Act 1950. Furthermore, the claim of native customary rights over Kampung Peta is, very crucially, supported by documents from and averments by the respondents themselves. In particular these include the following:
- F**
- G**
- H** (a) a letter dated 4 August 2010 from Pegawai Hal Ehwal Orang Asli Daerah Mersing to Pengarah Hal Ehwal Orang Asli, enclosing a report prepared by Pentadbiran Hal Ehwal Orang Asli Daerah Mersing dated 3 August 2010. This report, which is contained in the affidavit in support of the first applicant as exh KP8, stated in no uncertain terms the following significant observations:
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- (i) the Kampung Orang Asli Kampung Peta encompasses the seven villages specified earlier in this judgment;
 - (ii) history of their occupation is recorded in as early as the 1940s;

- (iii) the permanent occupations on these lands involve cultivation of rubber trees; A
- (iv) the second applicant, Batin Sangka Chuka succeeded Tok Batin Tiam;
- (v) Kampung Pantai Burung is the burial ground of the Orang Asli Jakun Kampung Peta, which is the symbol of their customary land rights. This is also where some of their ancestors were born and now buried; B
- (vi) in 1960 Jabatan Hal Ehwal Orang Asli made a formal application for Kampung Orang Asli Peta and the villages surroundings it to be *gazetted* as aboriginal reserve but the process got postponed, but subsequently reviewed in the 1980s; C
- (vii) the Kampung Orang Asli Kampung Peta was *gazetted* in 1989 (547 acres in size), as was the boundary exercise for Endau Rompin National Park approved in 1989;
- (viii) if however the boundary delineation exercise of the Endau Rompin National Park had been referred to either the Tok Batin or Jabatan Hal Ehwal Orang Asli, Kg Pantai Burung and Kg Kuala Jasin would certainly have not been included within the boundaries of the Endau Rompin National Park; D
- (ix) the *orang asli* did not encroach into the Endau Rompin National Park but it was the reverse. The National Park instead ignored the fundamental rights of the *orang asli* and knowingly included their native customary lands, complete with the rubber plantation and burial grounds within the boundaries of Endau Rompin National Park; and E
- (x) the customary land at Kg Pantai Burung should be returned to the Orang Asli Jakun of Kampung Peta. F

[49] Those are the findings of the Pegawai Hal Ehwal Orang Asli Mersing representing the department tasked with the responsibility to promote the welfare of the *orang asli* in Peninsular Malaysia no less, where the essence, import and purport of the report could not have been any more definitive in providing the requisite evidence of the existence of a prior, continuous and unbroken occupation of the Orang Asli Jakun Kampung Peta in the areas of customary lands as specified in the instant application, which thus indisputably validates the claim to their native customary land rights, both already *gazetted* (547 acres or 221.36 hectares) as the *gazetted* lands well as parts *ungazetted* including areas (specifically, the *ungazetted* land) now situated within the Endau Rompin National Park. G H

[50] There is yet another official letter which provides equally compelling evidence of the existence of customary land rights of the Orang Asli Jakun Kampung Peta. This is the letter from the office of the Assistant Protector of Aborigines, Johore in Mersing dated way back on 22 May 1954 (also in exh I

- A KP8 of the affidavit in support of the first applicant). The suggestion as contained in this letter was for the areas covered by the Endau river basin to be declared and *gazetted* as 'Aboriginal Reserves' as the aborigines had even then expressed concerns about the future of their ancestral land, cultivation activities and jungle products at various places along Anak Endau River. It was
- B specifically recommended by the Assistant Protector of Aborigines Johore that both sides of the Endau banks and three miles on either side be reserved to the *orang asli*. This clearly refers to areas beyond the presently 547 acres of *gazetted* aboriginal land of Kampung Peta region.
- C [51] Further, the affidavits in reply by the third, fourth and sixth respondents also admitted that even before the gazetting of Kampung Peta, the *orang asli* had occupied and cultivated tracts of lands in Pantai Burung and surrounding areas and that post *gazetting* of the Endau Rompin National Park, the *orang asli*
- D had been given 'consent' to continue working on their existing rubber plantation, visit burial grounds and practice their customs and traditions. This further provides unchallenged evidence, emanating from the respondents themselves, of the history of prior and continuous occupation of Kampung Peta extending into the presently *ungazetted orang asli* land within the boundaries of the Endau Rompin National Park. The evidence of continuous
- E occupation provides the foundation of the existence of native customary and proprietary land rights covering the entire extent of the areas of the land, *gazetted* as well as *ungazetted*.
- F [52] Yet further evidence, similarly unchallenged, (thus attracting the application of the principle established in *Saeng-Un Udom v Public Prosecutor* [2001] 3 SLR 1, where in the absence of any affidavit or expert evidence to the contrary, the evidence of expert made available stands admitted) can be found in the expert witness affidavit of Dr Colin Nicholas, whose research also refers
- G to literatures by ethnographers published as far back as 1881 and 1841 which noted that the Jakuns of Johore had lived and occupied the upper branches of the most Southern system of rivers in the Malay Peninsular including the Endau. Dr Colin Nicholas stated in his report (exh CGN2) that the Jakuns of Kampung Peta have been in continuous occupation of their customary lands to
- H presently. The expert report provided a credible support to the community map exhibited to the affidavit in reply by the first applicant. The community map has sufficiently and clearly marked out prominent sites of villages, fruit trees, ceremonial, traditional and customary locations. The relevant parts of the uncontroverted report by Dr Colin Nicholas on the point is most pertinent:
- I Early Jakun presence in Upper Endau
17. On focusing my research on the Orang Asli in the state of Johor, especially in the Endau River basin, my studies have revealed that the Orang Asli have been occupying their traditional territories from very early times. This is attested to by published historical accounts and in the works of very early writers.

.....

Continued Jakun presence in the Customary Lands

25. Renowned Japanese anthropologist Prof. Narifumi Maeda Tachimoto lived among the Jakuns along the Endau River in the 1960s. His research has been published in various journals and in his book *The Orang Hulu*. [Please see pages CN107–CN124 of this report].

26. In Chapter 2 of his book, at pages 13 to 24, he discusses the settlements of the Orang Hulu, by which name the Jakuns here are also called, situated along the banks of the Endau River, Kampung Peta is one of them. At page 23 he writes specifically about Kampung Peta, as follows:

Peta is situated the farthestmost upstream among the hamlets I studied in the upper courses of the Endau near the mountain (*bukit*) named Peta (Figure 10). Like the core population of Punan, that of Peta seems to have formerly dwelt along the Kinchin River and the upper reaches of the Endau.

[Please see page CN117 of this report.]

27. To support this contention, he quotes, at pages 23–24, Lake and Kelsall who, in their 1894 article on *A journey on the Sembrong from Kuala Indau to Batu Pabat*, mentioned meeting Jakuns from settlements ranging from 25 to 60 individuals at various locations that transect the boundaries of the current Endau-Rompin National Park. These included locations such as Kuala Lemakoh, Batu Gajah, Linggor and Selai (the latter on the western boundary of the current national park). [Please see pages CN125–CN135 of this report for the article by Lake and Kelsall.].

.....

Summary of Conclusions

98. Based on my study, I find that the Jakun-Orang Asli of Kampung Peta are the descendants of the earlier known peoples who settled and travelled in the greater Upper Endau River basin before the arrival of non-Jakun people.

99. The customary lands of the Kampung Peta Jakuns is within a distinct boundary that includes the customary areas of Padang Iwah, Kuala Jasin, Pantai Burung, Ulu Endau, Batu Gajah, Kuala Lemakoh, Kuala Kinchin and Bukit Janing.

100. The Jakuns who live in the customary lands are a unique and distinct community who exercise exclusivity in their social membership. They also continue to practice the culture and traditions of their ancestors to a reasonable extent.

101. Some of their customary lands are individually owned and managed, which most are held collectively. All land dealings and use are subject to community rules and traditions.

102. The Jakuns of Kampung Peta still practice their traditional customs on the land and continue to perform the necessary rituals in their customary lands. By continuing to acknowledge and observe these customs that are distinctive to Orang Hulu culture, the Jakuns of Kampung Peta have maintained a connection with their customary lands.

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- A 103. The community still depends on the land for their economic livelihood and subsistence needs. This includes the area known as Pantai Burung which is within the current park boundaries.
- B 104. With the exception of their forced resettlement during the Emergency, the Jakuns of Kampung Peta did not at any material time abandon their customary lands.
105. The Orang Asli Reserve gazetted in 1989 represented a small proportion of their customary lands. The large part of their customary lands remain ungazetted, and as such with insecure tenure.
- C [53] The presence of the Jakuns of Kampung Peta in the said areas throughout the customary lands can therefore be said to be fairly established and long-standing to the extent that the fourth and sixth respondents' main argument is more to the point that the applicants' rights to their customary
- D lands are confined only to their settlement areas. This contention is in my view plainly unsustainable in the face of the established common law position and the fact of continuous occupation and maintenance of a traditional connection with these areas, and for the reasons that I shall elaborate further below.
- E (iii) *Customary land rights not extinguished and continue to subsist*
- F [54] The respondents have also failed to establish the existence of any subsequent legislation which clearly extinguished the prior common law customary land rights of the Orang Asli Jakun of Kampung Peta. The respondents' bare assertion that the applicants' customary title and rights have been extinguished by law, predominantly by reason of the creation of the Endau Rompin National Park or that on the almost spurious basis that the applicants are incapable of exercising 'control' or ensure 'exclusivity' over the
- G customary lands is lacking in substance and is entirely devoid of merit, considering the weight of authorities, such as *Madeli bin Salleh*, *Bato Bagi* and *Sagong bin Tasi*, to name only a few, which have specifically ruled that such customary land rights under common law can only be overridden and extinguished by nothing less than plain, obvious and unambiguous legislative
- H prescriptions. None however, has been raised by any of the respondents, for there is not any.
- (iv) *Customary lands encompass hunting and foraging areas*
- I [55] The authority relied on by the respondents to state their position that the native customary rights do not extend beyond settlement sites to the jungle at large where the *orang asli* use to roam to forage for their livelihood is principally the Court of Appeal decision in *Nor Anak Nyawai*; in particular, to the following passage:

From the above two cases we note that the common feature which forms the basis of claim for native customary rights is the continuous occupation of land. Further, we are inclined to agree with the view of the learned trial judge in *Sagong bin Tasi & Ors* that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food. We note that even Mr Baru in his submission hinged the claim of the respondents over the disputed area on the assertion that they 'had been in continuous occupation and by express provisions of the law at the relevant time, been lawfully occupying the Disputed Area'. It is thus a matter of evidence adduced whether his submission can be sustained.

[56] However *Nor Anak Nyawai* was decided prior to the Court of Appeal decision in *Sagong bin Tasi* which had authoritatively held, on the issue of the determinant of the customary title, as follows:

As respects the present appeal two important principles emerge from the advice of the board. First, that the fact that the radical title to land is vested in the Sovereign or the State (as is the case here) is not an *ipse dixit* answer to a claim of customary title. There can be cases where the radical title is burdened by a native or customary title. *The precise nature of such a customary title depends on the practices and usages of each individual community. And this brings me to the second important point. It is this. What the individual practices and usages in regard to the acquisition of customary title is a matter of evidence as to the history of each particular community. In other words it is a question of fact to be decided (as it was decided in this case) by the primary trier of fact* based on his or her belief of where, on the totality of the evidence, the truth of the claim made lies. In accordance with well established principles, it is a matter on which an appellate court will only disagree with the trial judge in the rarest of cases. Here, of course, there is complete acceptance by the respondents of the facts as found by the learned judge. I have already set out his conclusions on the proved facts. Based on those facts and on the authorities he concluded that the plaintiffs had established their claim to a customary title to the land in question. (Emphasis added.)

[57] Nor was this ruling in *Nor Anak Nyawai*, which excludes land used for hunting and foraging from the content of customary land rights referred to by the Federal Court in *Madeli bin Salleh*. Indeed, the Federal Court in *Madeli bin Salleh* referred approvingly of the Australian High Court decision of *Mabo and others v Queensland (No 2)* (1992) 175 CLR 1 which in a majority judgment held as follows:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

A [58] Further, *Madeli bin Salleh* also makes it clear, as stated earlier in this judgment, that physical presence is unnecessary to prove occupation. Indeed, the ground-breaking case of *Adong bin Kuwau* recognised the rights to 53,273 acres of foraging lands forming part of the *orang asli* plaintiffs customary lands as occupied as proprietary rights protected by art 13 of the Federal Constitution. The following passage is instructive:

B In the present case adequate compensation for the loss of livelihood and hunting ground ought to be made when the land *where the plaintiffs normally went to look for food and produce* was acquired by the government. The compensation was not for the land but for what was above the land over which the plaintiffs had a right.
C (Emphasis added.)

[59] In addition, the important Canadian Supreme Court decision in *Delgamuukw v British Columbia* [1997] 3 SCR 1010 ruled the following on the subject of occupation:

D 149. However, the aboriginal perspective must be taken into account alongside the perspective of the common law. Professor McNeil has convincingly argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land: *Common Law Aboriginal Title*, at p 73; also see
E *Cheshire and Burn's Modern Law of Real Property*, at p 28; and Megarry and Wade, *The Law of Real Property*, at p 1006. *Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources*: see McNeil, *Common Law Aboriginal Title*, at pp 201-2. In considering
F whether occupation sufficient to ground title is established, 'one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed': Brian Slattery, 'Understanding Aboriginal Rights', at p 758. (Emphasis added.)

G [60] In my view, the weight of authorities suggest that lands used for roaming, hunting and foraging cannot be automatically excluded from being deemed to constitute a part of the ancestral and customary lands of the *orang asli*. When determining the question on the contents and extent of the customary land rights under common law, in situations concerning both settlement sites and the surrounding foraging areas, the fundamental and
H pivotal question is decidedly one of evidence of occupation, which could but need not be physical in nature, and that of the continuous traditional connection with the lands. As stated earlier, the crucial test is one of proof as a matter of fact. Mere assertions surely cannot form the basis of common law customary land rights. If a custom or usage concerning the activities of hunting and foraging can be established to be traditionally related to the lands in
I question, common law customary land rights may be established, subject to the satisfaction of the test of occupation enunciated in *Madeli bin Salleh*. Even then, the aspect concerning whether or not the claimants in any given case could show evidence of sufficient degree of control to prevent interference from

strangers should also be applied with considerations of pragmatism when dealing with vast foraging and roaming areas.

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[61] In my assessment, in light of the affidavit evidence referred to earlier, the applicants have indeed shown not only that the activities of hunting, fishing and foraging to be integral elements to the custom and traditional activities of the Jakuns of Kampung Peta, but that such practices are so very closely intertwined with their use of and very reliance on the lands they claim to be ancestral and customary in nature, which had long been the primary source and essence of their very existence and will continue to be essential to their future livelihood.

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[62] In my view, any other conclusion would be untenable for, given that the custom and traditions having connection with the lands of the *orang asli* determine the extent of their customary land rights, excluding foraging activities on lands beyond settlement sites when these, like the case for the Jakuns of Kampung Peta, clearly form part of their custom and daily usage and activities, is not justified under the law. A contrary position may have the unintended effect of threatening the continuation of not only the character but also the contents of their traditions and custom, and potentially in the long run the very survival of the *orang asli*, as presently identifiable with their custom and traditions.

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[63] Virtually all of the averments of the first and second applicants concerning the history, customs and activities of the Jakuns of Kampung Peta are not met with substantive and credible riposte but merely bare denials, if at all, bordering on requiring this court to apply the rule established by the Court of Appeal in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 to the effect that such averments of the Applicants could thus be deemed admitted. Given the compelling, and almost overwhelming, and in large parts uncontroverted affidavit evidence as I outlined above, there is no justifiable or rational basis for me to reach any conclusion other than that the Orang Asli Jakun Kampung Peta plainly have the common law right to their customary lands, which pre-existing customary land rights and thus prior ownership of native title over the areas of land claimed by the applicants are not impaired or in any way affected by subsequent legislative interventions including the NLC, and is thus protected by art 13 of the Federal Constitution.

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[64] Such customary land rights extend beyond settlement sites to the hunting and foraging areas since it has also been proven, not only from especially the evidence of the applicants, but also the expert report that such activities constitute an integral element of the Orang Asli Jakun Kampung Peta's custom, occupation and usage of their customary lands. I should reiterate that the threshold issue of prior and continuous use and occupation, being the

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A pre-requisite to establishing customary land rights has been found to be satisfactorily met on account of the foregoing evidence.

[65] Therefore, the fourth and sixth respondents' argument that continuous occupation of the Orang Asli Jakun Kampung Peta in respect of the claimed area within the Endau Rompin National Park cannot be proven pursuant to the test approved by the Federal Court in *Madeli bin Salleh* on the existence of sufficient measure of control to prevent strangers from interfering in the sense of what the respondents construed as exclusivity over the said lands is in my view unsustainable. First, *Madeli bin Salleh* does not actually mention the test of exclusivity, at least not in the sense that the respondents are contending.

[66] Secondly, and more fundamentally, the test of occupation is not merely physical occupation. As mentioned earlier, *Adong bin Kuwau* involves a decision which ruled that the vast areas of ancestral lands on which the claimants foraged for their livelihood to be subject to customary land rights. The case of *Delgamuukw* is even more specific on its pronouncement of the point to such effect. In the instant case, the evidence of use of areas within the customary lands for hunting, roaming, fishing and foraging is manifest. Their continuous use of the customary lands for such purposes is well established, if not even documented and chronicled. I do not find evidence that such activities in the relevant areas of the customary lands to be affected by any unwelcomed intrusion or interference by third party strangers. Indeed, as mentioned earlier, there is also evidence, similarly unchallenged, that entry into the customary lands is regulated in the sense that even other Jakuns (not from Kampung Peta) would require express permission before granted access. In any event, the long established and continuous use of lands for hunting and foraging activities, on the facts of this instant case, fortify the implication that the Jakuns already having a reasonable and sufficient degree of control over the customary lands, to the exclusion of strangers.

[67] Thirdly, the argument that there is no exclusivity or sufficient control to prevent interference because the third respondent had built permanent structures on the claimed lands within the Endau Rompin National Park is clearly flawed by reason of the trite principle that one cannot take advantage of one's own default. The application of the legal principle that a party cannot benefit from his own breach or default can be seen in the case of *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489 where the Court of Appeal decided that a land owner who erected a warehouse on his land in breach of the requirement to obtain planning permission should not receive any benefit from it from any compensation to be paid in respect of the acquisition of the land. Similarly in the case of *Khoo Cheng (P) & Ors v Pentadbir Tanah Muar* [2006] MLJU 641; [2008] 3 CLJ 534, the order of forfeiture in favour of a party was set aside because of prior non-compliances

with a number of mandatory requirements of the NLC by the same party. Indeed, the Court of Appeal in *Sagong bin Tasi* too stated that it would not be correct for the state government to argue that no compensation ought to be paid on account of the non-gazetting of the relevant customary lands, which should have been but failed to have been undertaken by them in the first place. In the instant case, the third respondent should probably not have built the structures on a land that rightfully belonged to the applicants. At least not without acknowledging the pre-existing customary land rights of the applicants.

(v) Respondents owe a fiduciary duty

[68] This finding on default emphasises the important point – that is on the breach of fiduciary duty on the part of the respondents who are bound under the law to protect the applicants and the Jakuns of Kampung Peta in the first place. I have no hesitation in finding that the test to establish the existence of a fiduciary duty as stated in *Frame v Smith and Smith* as submitted by the respondents are clearly met. But in any event, the proposition of law that federal and state governments owe a fiduciary duty to ensure the safeguard of the welfare of the *orang asli* including the protection of their land rights is already settled and free from doubt. In *Sagong bin Tasi*, the Court of Appeal held as follows:

In my judgment, it was open to the judge to have made a finding that the failure or neglect of the first defendant to *gazette* the area in question also amounted to a breach of fiduciary duty. Here you have a case where the first defendant had knowledge or means of knowledge that some of the plaintiffs had settled on the *ungazetted* area. It was aware that so long as that area remained *ungazetted*, the plaintiffs' rights in the land were in serious jeopardy. It was aware of the 'protect and promote' policy that it and the fourth defendant had committed themselves to. The welfare of the plaintiffs, on the particular facts of this case, was therefore not only not protected, but ignored and/or acted against by the first defendant and/or the fourth defendant. These defendants put it out of their contemplation that they were ones there to protect these vulnerable first peoples of this country. Whom else could these plaintiffs turn to? In that state of affairs, by leaving the plaintiffs exposed to serious losses in terms of their rights in the land, the first and/or fourth defendant committed a breach of fiduciary duty. While being in breach, it hardly now lies in their mouths to say that no compensation is payable because of non-gazettation which is their fault in the first place. I am yet to see a clearer case of a party taking advantage of its own wrong. For these reasons, the plaintiffs were plainly entitled to a declaration that they had customary title to the *ungazetted* area which is more clearly demarcated in the plan exh P1 and marked in green and yellow. The strip of land that was excised out of the whole area runs across the portions marked green and yellow as well as the gazetted portion marked in orange. It is the former area in respect of which compensation must be paid in accordance with the 1960 Act. This part of the cross appeal must therefore be allowed.

A [69] The Federal Court in *Bato Bagi* made the same point no less clearly in the following manner in the judgment of Richard Malanjum CJ (Sabah and Sarawak):

B As for the argument that the government stands in a fiduciary position to protect the interests of the natives, I am of the view that such a notion has been accepted by our courts (see: *Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors*. It has also been adopted in foreign jurisdictions (see for instance the Supreme Court of Canada in *Delgamuukw v British Columbia* [1997] 3 SCR 1010). It is therefore not unheard of that the government ought to protect the interests of the natives and stand in a fiduciary position vis a vis the natives.

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D [70] In fact it is difficult for the fourth respondent to deny that it owes a fiduciary duty to the applicants as it has admitted to that effect in its letter of 4 August 2010 and the accompanying report of 3 August 2010 especially the statement in para 8 on p 81 which states the following:

E Pada tahun 1960, Jabatan Hal Ehwal Orang Asli telah membuat permohonan secara rasmi supaya Kampung Orang Asli Peta dan kampung dalam gugusannya digezetkan sebagai Kawasan Simpanan Orang Asli, tetapi proses itu tertangguh ... ('gugusannya' is defined as the seven identified villages – emphasis added).

The earlier letter of 22 May 1954, as highlighted earlier, is also of similar effect.

F [71] Based on the evidence referred to earlier, the respondents had, as similarly found in *Sagong bin Tasi*, breached their fiduciary duty to the applicants and the Orang Asli Jakun Kampung Peta, principally for failing to ensure that the entire customary lands were *gazetted* as aboriginal reserve or at least not included within the Endau Rompin National Park, and for their continued failure to take steps subsequently to exclude that part of the
G customary land within the Endau Rompin National Park, despite having the knowledge of the fact of the continuous occupation of the said customary lands by the Orang Asli Jakun Kampung Peta, and more crucially, notwithstanding the recommendation by the fourth respondent or its predecessor as early as 1954 that the said lands should have been first *gazette*, as well as more recently
H in 2010 that the lands should be returned to the rightful owner, being the Orang Asli Jakun Kampung Peta. A delay of more than ten years in *gazetting* customary lands of the Orang Selat of Johor was ruled by the High Court to be a breach of fiduciary duty by the state government in *Pengarah Tanah dan Galian Johor dan satu lagi lwn Khalip bin Bachik dan satu lagi* [2013] 1 MLJ
I 799; [2013] 5 CLJ 639.

[72] Further, a proper interpretation of the Item 2 of State List of the Ninth Schedule to the Federal Constitution, art 44 on the legislative authority of the Parliament and the Aboriginal Peoples Act 1954, and considering art 8(5)(c) of

the Federal Constitution referred to earlier, would in my view, define the welfare of the *orang asli* more widely and purposively to include the protection and *gazettal* of the *orang asli* customary lands.

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[73] I am in agreement with the proposition that the power of a legislative body to promulgate laws on a subject matter extends to all ancillary and subsidiary matters to achieve the intended objective of the Constitution and its means of governance (see the Indian Supreme Court decision in *Sh Jilubhai Nanbhai Khachar Etc v State of Gujarat And Anr* AIR 1995 SC 142). There is thus no cogent basis for the fourth and sixth respondents to contend with the argument (which given the context of the instant case, a simplistic one) that matters pertaining to *gazettal* of land, being land matters, are not within the purview of the federal government. After all, the role of the director general of the fourth respondent and the extensive powers of the relevant Minister under the Aboriginal Peoples Act 1954 clearly meet the characteristics of a fiduciary relationship established in accordance with the test in *Frame v Smith and Smith* which I alluded to earlier.

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[74] In addition, s 7 of the Government Proceedings Act 1956 ('the GPA') does not make the fourth and sixth respondents immune from such suits because the present application does not involve the question of the exercise of public duties within the meaning ascribed to it in the GPA. The exercise of public duties in the GPA is defined in the context of a different scope as follows:

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(2) For the purpose of subsection (1) the expression 'exercise of the public duties' includes –

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- (a) the construction, maintenance, diversion and abandonment of railways, roads, bridle-paths or bridges;
- (b) the construction, maintenance and abandonment of schools, hospitals or other public buildings;
- (c) the construction, maintenance and abandonment of drainage, flood prevention and reclamation works; and
- (d) the maintenance, diversion and abandonment of the channels of rivers and waterways.

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Further, the above definition in s 7(2) has no relevance to the nature and character of the fiduciary duty applicable in the instant case, which is recognised by common law.

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VALIDITY OF THE NOTICE UNDER SECTION 425 OF THE NLC

(i) *Grounds for judicial review*

A [75] The fundamental premise on which judicial review can provide a remedy had been enunciated by Lord Diplock in the landmark House of Lords decision in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. In administrative law, judicial review remedies can therefore be granted in respect of the following key categories against relevant governmental and public authorities:

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- (a) illegality: where the decision maker has not understood correctly the law that regulates his decision-making power and given effect to it;
 - (b) irrationality: where the decision is so outrageous in its defiance of logic or of accepted moral standards such that no sensible person who had applied his mind to the question to be decided could have arrived at it; and
 - (c) procedural impropriety: where there is a failure by the decision-making body to observe procedural rules that are expressly laid down even where such failure does not involve any denial of natural justice.
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E [76] Not only are the categories not exhaustive (see the Federal Court decision of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 AMR 433), but the development of administrative law in Malaysia has also firmly established that whilst judicial review proceedings do not involve the exercise of an appellate function, the merits of the decisions of inferior tribunals can be reviewed in circumstances deemed to constitute an exception to the principle of the role being supervisory in nature (see the Federal Court decision in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288).

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G [77] It is therefore well-established that public authorities and inferior courts must disregard irrelevant considerations nor fail to take into account relevant considerations. A more recent decision of the Federal Court in the case of *Malaysia Airline System Bhd v Wan Sa' adi @ Syed Sa' adi bin Wan Mustafa* [2015] 1 MLJ 757; [2015] 1 CLJ 295, cited with approval an earlier ruling of the former Supreme Court in *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417; [1991] 2 CLJ 881 with emphasis on the following observation by Jemuri Serjan SCJ (as he then was):

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Unreasonableness here, in our view, was used in the context of the broad sense of that term as expounded by Lord Greene MR in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. 'Reasonableness' here embraces the various heads of ultra vires – such as misdirecting oneself in law, taking into account irrelevant considerations, or failing to take into account relevant considerations – which is now known as the *Wednesbury* principles ...

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[78] The Federal Court in *Malaysia Airline System Bhd v Wan Sa' adi @ Syed Sa' adi bin Wan Mustafa* further affirmed that a decision could also be

considered manifestly unreasonable if no body of persons could have reached it, and that in order to come to such conclusion there must be overwhelming evidence to support it.

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[79] The concept of an error of law also embodies substantially similar ultra vires permutations, if not of even wider application. *Halsbury's Laws of Malaysia* Vol 9 para [160.076] describes the same as follows:

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Errors of law include misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof.

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[80] The following passage from the judgment of Gopal Sri Ram JCA (as he then was) in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 on the concept of 'error of law' is most instructive:

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In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahrulzaman v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308; [1995] 1 CLJ 619), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.

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It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.

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Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunised from judicial review by an ouster clause however widely drafted.

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[81] It is therefore incumbent on the High Court in any judicial review application to make the evaluation whether there had been any shortcomings that would tantamount to a defect in the *Wednesbury* unreasonableness sense,

A comprising either an illegality, irrationality or procedural impropriety (and proportionality) or otherwise involving an error of law to justify invoking the public law remedies prayed for.

B [82] On the issue of the validity of the said notice, considering my finding on the existence of the customary land rights of the Orang Asli Jakun Kampung Petain relation to both *gazetted* land and *ungazetted* land throughout the customary lands, the contention of respondents that the notice is lawful, reasonable and procedurally proper is therefore untenable. Given especially the non-applicability of the NLC to native customary rights, the purported jurisdictional basis for the reliance and subsequent issuance of the notice which, considering the totality of affidavit evidence must have been intended to be directed at the applicants vis a vis an area within the Endau Rompin National Park, is plainly misconceived under the law, thereby rendering the decision embodied in the notice ultra vires the NLC, the Aboriginal Peoples Act 1954 and the Federal Constitution and is thus manifestly not valid, for being inflicted with an illegality and error of law.

E [83] In any event, going by the respondents' own line of argument that the law only recognises settlement area of the *orang asli*, given that it is beyond dispute that the Jakuns of Kampung Peta occupy and live in villages including Kampung Pantai Burung located within the Endau Rompin National Park, the first respondent's decision to issue the notice demanding the eviction of the Jakun of Kampung Peta out of the Endau Rompin National Park, is very crystal – clearly therefore tantamount to a manifest error which is indefensible under the law.

G [84] Additionally, the patent failure on the part of the said respondents to have taken into account relevant consideration, specifically the legally recognised customary land rights of the applicants and the Orang Asli Jakun Kampung Peta at common law to the claimed customary tracts of land within the boundaries of the Endau Rompin National Park, is similarly yet another facet of an error of law or an illegality that is amenable to the public law remedy of judicial review, as is the case in relation to the denial of the right of the applicants to be heard despite the admission by the said respondents that they had even consented to the applicant entering into and occupying the land area of Kampung Pantai Burung and its surrounding parts within the Endau Rompin National Park.

I [85] This is not to mention the documentary evidence in the form of letters authored by officials of the first and fourth respondents referred to earlier, clearly giving rise to at the very least a legitimate expectation on the part of the applicants that they would be consulted or afforded the opportunity to be heard. In *Council of Civil Service Unions v Minister for the Civil Service* [1985]

AC 374, Lord Fraser identified two situations that could give rise to a legitimate expectation. First is where there is an express promise by the relevant authority and secondly, where there exists a regular practice that an applicant may reasonably expect would continue.

[86] Both such circumstances are present in the instant case. It is well established, as pronounced by Raja Azlan Shah FJ (as His Highness then was) in *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 that the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action. Of similar effect is the Court of Appeal decision in *Majlis Perbandaran Pulau Pinang v Syed Ahmed al/MM Gouse Mohamed* [2007] 1 MLJ 42; [2007] 1 CLJ 547 which concerns property rights. Gopal Sri Ram JCA (as he then was) held as follows:

It is a settled principle of public law that a person must be heard before he or she is deprived of his or her property (see *Cooper v The Wandsworth Board of Works*). Since the respondent was deprived of his house in breach of the rule in Cooper's case, the respondent was plainly entitled to be compensated for the loss of his house. Further, there was a clear violation of art 13(1) of the Federal Constitution wherein the respondent should have been given an opportunity of being heard. It has been repeatedly held by the courts across the Commonwealth that compensation is payable to a person whose constitutionally guaranteed fundamental right, such as the right to life, personal liberty or property is violated.

It is thus beyond dispute that the total failure by the said respondents in this regard constituted a procedural impropriety, justifying yet another basis for an order of certiorari be issued to quash the notice.

[87] Furthermore, considering the circumstances of the issuance of the notice, where the applicants and Orang Asli Jakun of Kampung Peta and other alleged trespassers were given only 24 hours to vacate and leave the Endau Rompin National Park and tear down any structures built thereon, when it is as clear as daylight that the applicants had been living in a settlement site within the Endau Rompin National Park itself, the notice borders on representing a decision which is irrational or unreasonable in the sense that it is 'so outrageous in its defiance of logic or of any acceptable moral standards that no sensible person who had applied his mind to the question to decide could have arrived at it' (see *Bromley London Borough Council v Greater London Council and another* [1983] 1 AC 768 and *Malaysia Airline System Bhd v Wan Sa'adi @ Syed Sa'adi bin Wan Mustafa* [2015] 1 MLJ 757; [2015] 1 CLJ 295 referred to earlier).

A [88] As such, the decision of the respondents, particularly the first
respondent, to evict the Orang Asli Jakun of Kampung Peta (even if only a
section thereof) as constituted by the issuance of the notice purportedly in
pursuance of s 425 of the NLC, following a written request by the third
respondent was clearly flawed and defective for having been afflicted by
B instances of error of law and *Wednesbury* unreasonableness in the various
aspects of illegality and procedural impropriety. This more than justifies the
court directing that an order of certiorari be awarded to quash the notice, the
decision encapsulated therein, as well as the full import and purport of what it
C sought to achieve.

RELIEFS

D [89] The landmark Federal Court decision in *R Rama Chandran v The
Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147
made it clear that the court has the power in a judicial review application to
mould the remedy to suit the justice of the case. This is now reinforced by O 53
r 2(3) of the Rules of Court 2012. I further take the view that most of the
declaratory and consequential reliefs sought by the applicants in respect of their
E customary land rights and breach of fiduciary duty owed by the respondents are
inherently intertwined with the principal relief of certiorari applied for
concerning the impugned notice and in accordance with O 53 r 2(2) of the
Rules of Court 2012 are clearly related to or connected with the same subject
F matter which arose from the question on the extent of the land rights of the
applicants in the customary lands.

[90] I also find that given the facts and evidence in the instant case, the
applicants have clearly fulfilled the test for the granting of declaratory relief as
established by *Caxton (Kelang) Sdn Bhd v Susan Joan Labrooy & Anor* [1988] 2
G MLJ 604, and the objection by the respondents on this ground is thus wholly
without merit. Further, the relief of the remedy of mandamus to compel the
gazetting of the customary lands is not precluded by s 44(1)(b) of the Specific
Relief Act 1950 as the provisions under the Aboriginal Peoples Act 1954 must
H also be read together with the overriding fiduciary and constitutional duty of
the respondents under the art 8(5)(c) of the Federal Constitution, in respect of
which any non-feasance must surely be actionable in law. Cases such as *Kent
and Porter v East Suffolk Rivers Catchment Board* [1939] 4 All ER 174 ought
I rightfully to be distinguished since even though it establishes that non-feasance
on the part of the government is not actionable, this, in my view, is only of
relevance to a situation concerning a breach of a public duty in the nature
which does not strictly involve and is in contradistinction to breaches of
constitutional and fiduciary duties.

[91] Even though there are averments on behalf of the first and fourth respondents that the said notice was not targeted at the applicants and that there was no intention to evict them, in my judgment, the wordings of the notice are widely drafted to have the effect of including them as well. More directly to the point, the letters between the parties during the few months prior to the date of the notice highlighted earlier, clearly demonstrated that the applicants and the Orang Asli Jakun Kampung Peta were the intended target audience of the first respondent.

[92] Furthermore, applicants' prayers for the remedy of declarations, apart from being within the contemplation of O 53 r 2(2) and (3) is also wholly unsurprising and entirely understandable. This is since their primary concern of being dispossessed of their ancestral community lands has always been the overriding imperative foremost on their minds such that the issue should in the interest of justice be comprehensively addressed. As mentioned earlier, a letter dated in 1954 from the Aboriginal Administration Office in Mersing recommending the *gazetting* of aboriginal reserve along the Endau River had even then already emphasised the apprehension of the *orang asli* about their customary land rights. As parties entrusted with the fiduciary duty to ensure the protection and well-being of the *orang asli* in Peninsular Malaysia, it is now most opportune for the long outstanding and unresolved issue of customary and ancestral lands be afforded by the respondents a meaningful and total closure as Orang Asli Jakun Kampung Peta so truly long-deserved.

[93] Accordingly, in light of the foregoing, the reliefs prayed for by the applicants in encl 1 are hereby granted in the following manner. Prayers (i)–(iv) and (vi)–(ix) on certiorari, certain declarations and mandamus are all allowed. In respect of prayer (ii), an official survey should also be undertaken by the relevant respondents immediately to draw the formal boundaries of the customary lands of the Orang Asli Jakun Kampung Peta by using natural boundaries of rivers and hills and procure the *gazetting* of the said customary lands to be as closely as possible corresponding to the area of the customary land asserted by the applicants as per the community map, and for the gazette exercise to be completed within 18 months, at the cost to be borne by the relevant respondents. A similar order was made by the High Court in *Mohamad bin Nohing (Batin Kampung Bukit Rok) & Ors v Pejabat Tanah dan Galian Negeri Pahang & Ors* [2013] 5 MLJ 268.

[94] On this, I agree with the relevance of the authorities submitted by the applicants, namely the Court of Appeal decisions in *Superintendent of Lands and Surveys Department Sibul Division & Anor v Usang ak Labit & Ors and another appeal* [2014] 3 MLJ 519 and *Abu Bakar bin Pangis & Ors v Tung Cheong Sawmill Sdn Bhd & Ors* [2014] 5 MLJ 384, to the effect that the community map produced by the *orang asli* such as the applicants is not meant

- A to be an official or professional map but is more to serve as a general visual guide to the spatial extent of the ancestral lands. As the following passage from *Usang ak Labit* would readily demonstrate, the courts have accepted such community maps as sufficient in native customary right cases:
- B Objection was made that it was not a licensed surveyor and should not be used. We are of the view it is to illustrate the statement of claim, and at the end of the day, the map is not contradicted by the aerial photographs below when maps were superimposed by the appellants.
- C [95] Similarly, in *Abu Bakar bin Pangis* the court made the following observation:
- In our view, a realistic approach must bear in mind also that:
- (a) NCR lands are held without requirement of survey, registration and issued document of title;
- D style="padding-left: 80px;">(b) the natives living off their NCR lands are a subsistence culture, not sophisticated businessmen, and can hardly be expected to afford to pay quit rents, let alone survey fees; and
- (c) even the government makes it a condition the timber licensees and lessees of provisional leases to undertake and bear the cost of surveys.
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- F [96] In addition, in the instant case, at the risk of being repetitive, it is still worthy of emphasis that the credibility of the customary map is also supported by the expert evidence of Dr Colin Nicholas. For example, he stated the following in paras 17 and 18 of exh CGN2:
17. On focusing my research on the Orang Asli in the state of Johor, especially in the Endau River basin, my studies have revealed that the Orang Asli have been occupying their traditional territories from very early times. This is attested to by published historical accounts and in the works of very early writers.
- G style="padding-left: 40px;">18. For example, D.F.A. Hervey in his 1881 article on *Endau and its Tributaries*, at page 120–121 stated that:
- Some few years back the Jakun on the Endau, that is to say, the Endau, Sembrong, and their tributaries, were in comparatively comfortable circumstances, procuring the produce of the jungle for traders, and receiving the ordinary returns in kind, or planting tapioca, sweet potatoes, sugar-cane, and plantains ...
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- I [97] I do not allow prayer (v) on the declaration of failure by respondents to exercise the powers as this is unnecessary; and I also do not grant (x)–(xiii) on injunction and damages because in my view the injunctions would similarly be unnecessary given the granting of the declarations on the customary land

rights, and that I did not find a compelling basis to award damages to the applicants in the absence of evidence of significant tangible loss suffered by the applicants.

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OVERALL EVALUATION

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[98] Although the judicial review application by the applicants originates from their reaction to the issuance of the notice now sought to be quashed, the overarching thrust of their case is to have their assertions of customary land rights over the customary lands validated by this court. Applying the clear precedents of legal principles established by the appellate courts to the weight of affidavit evidence placed before this court, largely un-contradicted by the respondents, including those averments which emanate from the respondents themselves, I arrived at the conclusion in support of the existence of customary land rights, and in the process also found a breach of fiduciary duty of the relevant respondents in failing to ensure the requisite protection of the welfare, including the land rights of the Orang Asli Jakun Kampung Peta. On the facts, this finding of customary land rights extends throughout the customary lands and include areas used by the applicants and Orang Asli Jakun Kampung Peta for hunting, roaming and foraging activities. This decision is also the key result of the analysis as I have described above, that the existence and essence of customary title and land rights is determined by continuous occupation which in turn is evidenced either by actual physical occupation or continuation of traditional connections with the land in the form of hunting, foraging and the maintenance of uncultivated jungle. Such foraging and hunting activities fall within the latter category and at the same time, fulfill the test of preventing strangers from any intrusions, based on the affidavit evidence adduced.

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[99] The existence of the customary land rights established, the notice would no longer be tenable and thus ought appropriately to be quashed by certiorari. There are no legal impediments to the granting of other public law remedies of declarations and mandamus.

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CONCLUSION

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[100] In view of the foregoing reasons, in conclusion, it is my finding that the applicants have on a balance of probabilities succeeded in establishing their case for judicial review of the decision relating to the impugned notice issued by the first respondent. I therefore grant the reliefs according to the terms as I have stated above, and ordered costs of RM5,000 against the respondents.

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A *Application allowed in part with costs of RM5,000.*

Reported by Afiq Mohamad

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